The Catholic Lawyer

Volume 33
Number 3 *Volume 33, Number 3*

Article 4

October 2017

Abortion: From Roe to Webster

Phillip A. Smith

ABORTION: FROM *ROE* TO *WEBSTER*†

PHILIP A. SMITH

On July 3, 1989, the Supreme Court ended months of intense speculation by handing down *Webster v. Reproductive Health Services.*[1] In this decision, the Court curtailed the right to terminate a pregnancy but stopped short of reversing its historic *Roe v. Wade*[2] ruling. *Webster* was undoubtedly one of the most highly publicized and controversial rulings of the century. From the time the Court agreed to hear the case, abortion opponents and supporters alike engaged in an anguished and bitter effort to capture public opinion and to influence the Supreme Court itself. Given the intense level of anticipation while awaiting Webster, it was not surprising that the reactions to the decision were swift, emotional, and predictable. The immediate responses ran the gamut from jubilant claims that the decision marked the first step toward a complete reversal of *Roe v. Wade* to angry accusations that it undermined the right to abortion and endangered the autonomy of women. The purpose of this Article is to trace the development of the Court's abortion doctrine from its original opinion to its most recent. Since the *Roe* decision was the benchmark for all subsequent abortion rulings, I will begin with a brief overview of its framework.

I. THE *Roe* FRAMEWORK

In its famous *Roe v. Wade* abortion ruling over sixteen years ago, the Supreme Court declared that a woman's constitutional right to privacy was broad enough to include the decision to terminate her pregnancy. This right to abortion was a qualified right which had to be balanced against competing state interests.[3] In the matter of abortion, the state could have only two legitimate interests: maternal health and fetal life. In order to define the scope and limits of state regulation of these two inter-

---

† This article is republished in substantial part from No. 102/103 LAW & JUSTICE 6 (1989).

[1] 109 S. Ct. 3040 (1989).

[2] 410 U.S. 113 (1973).

[3] *Id.* at 154.

ests, the Court set up guidelines that established different standards for the different stages of pregnancy.

During the first trimester, when abortion was safer than childbirth, the state could not show any interest compelling enough to impose any restrictions on abortion. The decision belonged solely to the woman and her physician. From the end of the first trimester until viability, the state could regulate abortion, but only with an eye to maternal health. Here, the Court assumed that after the twelfth week of pregnancy abortion posed a greater risk to maternal health than did childbirth. At viability, the fetus acquired the "capability of meaningful life"[4] outside the womb. Then the state's interest in protecting fetal life became compelling enough for the state to regulate or even ban abortion, "except when . . . necessary to preserve the life or health of the mother."[5] In *Doe v. Bolton*,[6] a companion case to *Roe*, the Court declared that what the health of the mother meant in any particular case was a medical judgment to be

> exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[7]

The *Roe* decision invalidated the existing abortion legislation of virtually every state in the nation. Due to the sweeping nature of the ruling on such a deeply disputed issue, it was inevitable that the abortion controversy would continue to rage. However, friends and foes of the ruling did more than debate the implications of the Court's conclusions. Through a continuous series of legislative struggles, they strove to enact revised abortion statutes either to expand or to restrict the impact of the *Roe* decision. As a result, a host of lower court battles was spawned. The Supreme Court itself remained at the center of the ongoing debate. Repeatedly, it chose to interpret the scope of its original decision and to settle issues it had not anticipated, left ambiguous, or deliberately shelved.

For the sake of convenience, I will group the Court's abortion developments after *Roe* in the following categories: consent and notice requirements, restrictions on public funding, and standard of care regulations. I will conclude with a brief analysis of the *Webster* decision and add my own reflections on the abortion issues that will continue to occupy our attention for the immediate future.

---

[4] *Id.* at 163.
[5] *Id.* at 164.
[6] 410 U.S. 179 (1973).
[7] *Id.* at 192.

II. CONSENT AND NOTIFICATION DECISIONS

A. Parental Consent and Notification

The consent issue first surfaced in *Planned Parenthood of Central Missouri v. Danforth*,[8] handed down in 1976. *Danforth* involved a Missouri abortion statute stipulating that a woman, unmarried and under eighteen years of age, must get the written consent of one parent or person in loco parentis before she could obtain an abortion. The provision was qualified by the clause, "unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."[9] Relying on its conclusion from *Roe*, the Court invalidated the Missouri parental consent provision by a six-to-three majority.

While it held that a woman's right to abortion was not absolute, the *Roe* majority also insisted that her abortion choice was immune from government regulation during the first trimester. Writing for the majority in *Danforth*, Justice Blackmun argued that if the state itself could not interfere with a woman's choice, it could not delegate that power to a third party. The Court freely acknowledged that the state has a more legitimate concern in regulating the activities of minors than of adults. However, this interest was not compelling enough to override the minor's right to privacy by allowing a parental veto of her abortion decision. The Court hastened to add that its ruling referred to "blanket" provisions only. It was not suggesting that every minor, regardless of age or level of maturity, was capable of giving informed consent for terminating her pregnancy.[10]

The Supreme Court confronted parental consent once again in *Bellotti v. Baird II*.[11] This case grew out of a challenge to a Massachusetts statute that required an unmarried, pregnant minor to obtain the consent of both her parents for an abortion. If one or both parents refused permission, a judge of the Superior Court could authorize the abortion "for a good cause."[12] Justice Powell wrote the opinion. He narrowed the Court's task to determining whether or not the statute allowed for parental notice and consent in a way that did not unduly burden the right to seek an abortion. Even within this limited perspective, Justice Powell found two fatal flaws in the Massachusetts abortion provision. First, by requiring a minor to notify her parents before going to court, the regulation unduly burdened the adolescent's initial access to the courts. The majority in-

---

[8] 428 U.S. 52 (1976). For a discussion of the *Danforth* case, see Canavan, *The Theory of the Danforth Case*, No. 58/59 LAW & JUSTICE 99-109 (1978).

[9] MO. REV. STAT. § 188.020(3), (4) (1974).

[10] *Danforth*, 428 U.S. at 74-75.

[11] 443 U.S. 622 (1979).

[12] MASS. ANN. LAWS ch. 112, § 12S (Law. Co-op. 1977).

sisted that every minor must be completely free from parental interference in her efforts to persuade a judge either that she is mature enough to make her own decision or that, despite her immaturity, an abortion is in her best interest. Second, Justice Powell believed that the statute gave judges too much leeway in overruling a mature minor's decision to terminate her pregnancy. If a mature adolescent is fully competent to decide, a judge may not veto her decision.[13]

Parental consent was also at issue in *Akron v. Akron Center for Reproductive Health, Inc.*[14] At stake was a provision of an Akron city ordinance banning abortions for an unmarried minor under the age of fifteen unless she could secure a court order or the written permission of a parent or legal guardian.[15] Writing again for the six-to-three majority, Justice Powell struck down the provision on the grounds that it was a "blanket" provision similar to the Missouri statute invalidated in *Danforth*. The state may not declare that all adolescents are too immature to make their own decisions. Rather, the government must provide some alternative whereby the pregnant minor may show that she is mature enough to make such a decision, or that, in spite of her immaturity, an abortion would be in her best interest.[16]

Although the Court invalidated all the parental consent requirements, it left open the possibility that the state may demand some kind of parental notification or consultation when an immature minor seeks to end her pregnancy. In *H.L. v. Matheson*,[17] the Court addressed the issue of parental notification. The case resulted from a challenge to a Utah abortion statute by a fifteen-year-old unmarried girl living with her parents and relying on them for support. The Utah regulation required that a physician notify, if possible, the parents or guardian of a minor wanting to terminate her pregnancy.[18] The Chief Justice at that time, Warren Burger, authored the six-to-three majority opinion. The majority upheld the Utah provision for parental notice because it did not violate an immature and dependent minor's freedom of choice. Since neither parents nor judges had a veto power over the minor's decision, the notice requirement did not unduly burden her right to an abortion. Moreover, the Chief Justice argued that the state need not fashion its abortion regulations so as to encourage or facilitate abortion. On the contrary, encouraging childbirth is a legitimate expression of the state's interest in protecting poten-

---

[13] *Bellotti*, 443 U.S. at 640-50.

[14] 462 U.S. 416 (1983).

[15] AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.05(B) (1978).

[16] *Akron*, 462 U.S. at 439-40.

[17] 450 U.S. 398 (1981).

[18] UTAH CODE ANN. § 76-7-304(2) (1978).

tial life.[19]

B. *Spousal Consent*

The same Missouri statute that mandated parental consent also required the written permission of the husband for first trimester abortions.[20] This provision failed the constitutional challenge for the same reason that parental consent failed. The state could not delegate power to another that it did not have. The Court brushed aside the argument that the law was justified by concern for the marriage relationship. It did not believe that a marriage would be strengthened "by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all."[21] Ideally, both husband and wife should concur in the abortion decision. However, when they disagree, the woman's decison should prevail since she physically carries the child and is more directly affected by the pregnancy.[22]

C. *Informed Consent*

In *Danforth*, the Court upheld a Missouri provision that required a pregnant woman to give written, informed consent prior to obtaining an abortion. However, the Court did not address the issue of what kind of information might be provided to ensure that her consent be truly informed. The Court addressed that question in its *Akron* decision. At stake was an Akron city ordinance designed to ensure that pregnant women were fully aware of what they were doing when they decided to terminate their pregnancies. The ordinance required the attending physician to inform the pregnant woman about a number of specific issues, including the status of her pregnancy, the potential risks and complications associated with abortion in general, the special risks involved in her own pregnancy in particular, the technique to be used, and the characteristics, development, and humanity of her unborn child from the moment of conception. In addition, the woman had to wait twenty-four hours from the time she signed the consent form to the time she obtained the abortion.[23]

The Court's six-to-three majority agreed that informed consent re-

---

[19] *Matheson*, 398 U.S. at 411-13. Legally, "emancipated" minors are those who are married, self-supporting, or independent of their parents in other ways. "Mature" minors are those whom the law regards as capable of making informed decisions about their own health and welfare.

[20] MO. REV. STAT. § 188.020(3) (1974).

[21] *Danforth*, 428 U.S. at 71.

[22] *Id.* at 69-71.

[23] AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06(B), (C) (1978).

quirements embodied a legitimate state interest in maternal health. However, the majority found the Akron ordinance to be invalid because it went far beyond what was necessary for informed consent. The state's concern for the mother would not justify abortion regulations designed to influence the woman's informed choice between abortion and childbirth. The Akron provisions did just that. They were not designed to inform the woman's consent but rather to persuade her not to consent at all. Moreover, the requirement that a woman be told that her unborn child is human from the moment of conception was contrary to *Roe* because it reflected "one theory of when life begins to justify its regulation of abortions."[24] The Court found "an additional and equally decisive" objection to the provision in that it infringed on the discretion of the pregnant woman's physician. By demanding a long and rigid catalogue of information, the Akron regulations placed the physician in an "undesired and uncomfortable straitjacket."[25]

The Court also struck down the provision requiring that the attending physician personally inform the woman of the particular risks of her pregnancy. While admitting that such information was clearly related to the state's legitimate interest in maternal health, Justice Powell nevertheless invalidated this regulation because the disclosures had to be made by the attending physician. The state's concern was limited to ensuring that a woman's consent was free and informed. Any qualified person other than the attending physician could furnish the necessary information.[26]

The twenty-four hour waiting period suffered the same fate. The regulation was intended to provide the mother with an opportunity to reflect on the information she received before making her final decision. The Court invalidated the "arbitrary and inflexible" delay on grounds that it did not serve any legitimate state interest in promoting informed consent or safer abortions. In addition, Justice Powell noted that the waiting period would add to the cost of an abortion "by requiring the woman to make two separate trips to the abortion facility."[27]

III. ABORTION FUNDING CASES

Although the *Roe* Court listed poverty among the factors that complicate the abortion problem, it was not until 1977 that the question of

---

[24] *Akron*, 462 U.S. at 444.

[25] *Id.* at 445 (citing *Danforth*, 428 U.S. at 67 n.8).

[26] *Id.* at 448-49.

[27] *Id.* at 450. In Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), decided three years after *Akron*, the Court also invalidated the informed consent provisions of Pennsylvania's Abortion Control Act. I have not commented on that aspect of *Thornburgh* here because the act's informed consent requirements were similar to Akron's, and the Court used the *Akron* rationale to strike them down.

public funding of abortions for the indigent came squarely before the Court. Since the Medicaid program was involved in the *Beal v. Doe* and *Maher v. Roe* decisions, a brief background of Medicaid will be helpful in clarifying the underlying issues.

A. *Medicaid*

Title XIX of the Social Security Act[28] established the Medicaid program which enabled the states to provide federally funded medical assistance to the poor.[29] While the program is not mandatory, all participating states must fulfill certain conditions. For the purposes of Title XIX, the indigent are divided into two classes: the "categorically needy" and the "medically needy." The categorical group includes needy persons with dependent children, the aged, the blind, and the disabled. Medical coverage must be extended to all persons in this classification. The "medically needy" embraces all other disadvantaged persons. Medical attention may be given to this latter group at the discretion of the states, provided that reasonable standards are used to determine what kind of coverage is adequate under the objectives of Title XIX.[30]

B. *Beal v. Doe*[31]

The *Beal* case resulted from a class action challenge to Pennsylvania's Medicaid program which funded only medically necessary abortions.[32] Eligible for Medicaid but denied reimbursement for elective abortions, several indigent women maintained that the Pennsylvania regulations conflicted with the provisions of Title XIX. Justice Powell, who wrote for the six-to-three majority, ruled that Title XIX did not require the states to fund nontherapeutic abortions as a condition for participating in Medicaid. As long as the norms for determining the standard of care were reasonable and consistent with the objective of the Act, they did not violate Title XIX. According to the majority, the Pennsylvania regulations were in conformity with the Act's goal of providing assistance to low income persons who could not afford needed medical care. Here the Court implicitly distinguished between therapeutic and nontherapeutic abortions and labeled the latter as unnecessary medical services. Thus, Justice Powell could conclude that it was not contrary to "the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps

---

[28] 42 U.S.C. §§ 1396 - 1397 (1982).
[29] *Id.* § 1396(a).
[30] *Id.* § 1396(a)(10)(C).
[31] 432 U.S. 438 (1977).
[32] 3 Pa. Bull. 2207, 2209 (September 29, 1973).

desirable—medical services."[33]

The Court went on to reject on both economic and health grounds the litigant's argument that the exclusion of nontherapeutic abortions from medical coverage was unreasonable. Justice Powell insisted that the *Roe* decision had granted the state a valid and important interest in fostering childbirth throughout the entire gestation period. He could not find anything in the language or legislative history of Title XIX which suggested that normal childbirth was unreasonable or was in conflict with Medicaid.[34]

C. *Maher v. Roe*[35]

The *Maher* litigation involved a Connecticut Welfare Department regulation requiring documented medical evidence indicating that an abortion was medically necessary before a woman could be reimbursed.[36] Unable to obtain the necessary medical certificate, two indigent, pregnant women challenged the regulation on the grounds that it was inconsistent with the requirements of Title XIX and that it violated their equal protection rights. Regarding equal protection, the plaintiffs argued that the Connecticut regulation violated their equal protection guarantees by providing financial assistance for childbirth but denying it for abortion. Thus, the regulation set up a "suspect class," distinguishing between two different categories of pregnant women—those wanting an abortion and those wanting to bear a child. Furthermore, they contended that the regulation interfered with their fundamental right to reject childbirth and to choose abortion by agreeing to pay for the one but not for the other.[37] Since it had already ruled in *Beal* that states do not have to fund medically unnecessary abortions, the Court had only to decide whether Connecticut created a suspect class or interfered with a fundamental right.

Justice Powell wrote the narrow five-to-four majority opinion. He recalled that the Court has developed two clearly defined standards of review in its application of the equal protection doctrine: strict scrutiny and the minimum scrutiny or rational basis test. The Court has always demanded strict scrutiny when the legislation creates a suspect class or when it infringes on a fundamental right. In both these instances, the state must justify why it set up the class or regulated the right by proving that its interest is compelling. Where neither such a class nor such a right is at stake, the rational basis test, the less rigorous standard of review, is

---

[33] *Beal*, 432 U.S. at 444-45.
[34] *Id.* at 445-46.
[35] 432 U.S. 464 (1977).
[36] CONNECTICUT WELFARE DEPARTMENT, PUBLIC ASSISTANCE PROGRAM MANUAL, vol. 3, ch. III, § 275 (1975).
[37] *Maher*, 432 U.S. at 470.

applied. It merely requires that legislation bear a "reasonable relation" to a valid state interest.[38]

The Court upheld the Connecticut regulation, declaring that it neither created a suspect class nor violated a fundamental right. The fact that Connecticut favored childbirth over abortion did not establish poor pregnant women as a suspect class. For the purposes of equal protection analysis, Justice Powell argued, the Court "has never held that financial need alone identifies a suspect class."[39] Regarding fundamental rights, the Court distinguished between the existence of a right and its exercise at public expense. Justice Powell reaffirmed the fundamental right to abortion established in *Roe* but denied that the government must pay for its exercise. The Department of Welfare regulations did not curtail the right of indigent pregnant women to terminate their pregnancies. While Connecticut may have influenced such women's decisions by making childbirth a more attractive alternative, "it has imposed no restriction on access to abortions that was not already there."[40]

Since the Connecticut regulation did not create a suspect class or interfere directly with a fundamental right, there was no need to apply the compelling state interest test to the legislation. It was enough to show that the preference for childbirth over elective abortions was "reasonably related" to a genuine state concern. That was not difficult to do. *Roe*'s recognition of the state's strong interest in protecting the potentiality of the fetus[41] and *Beal*'s awareness of the state's "strong and legitimate interest in encouraging normal childbirth"[42] provided enough justification for the state to pay for childbirth but to deny assistance for abortion. While expressing sympathy for the plight of poor women seeking abortions, the majority opinion insisted that it was not the business of the Court to provide solutions for every financial or social problem. That task belongs to Congress.[43]

D. Harris v. McRae[44]

Unlike the *Beal-Maher* litigations which involved state Medicaid regulations, the *Harris v. McRae* decision dealt with a congressional effort to restrict Medicaid benefits for most therapeutic abortions as well as for all

---

[38] *Id.* at 470. (citing San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973)). For a good discussion of this topic, see Silverstein, *Benefits for Conscientious Objectors?*, 19 CATH. LAW. 62 (1973).

[39] *Maher*, 432 U.S. at 471-72.

[40] *Id.* at 474.

[41] Roe, v. Wade, 410 U.S. 113, 163 (1973).

[42] Beal v. Doe, 432 U.S. 438, 446 (1977).

[43] *Maher*, 432 U.S. at 479-80.

[44] 448 U.S. 297 (1980).

elective ones. The federal funding limitation was commonly known as the "Hyde Amendment." The version of the amendment that was in force when the *McRae* litigation reached the Supreme Court denied funds for abortions except when the life of the mother would be endangered by continuing the pregnancy or when the pregnancy resulted from rape or incest.[45] A class-action suit was brought to challenge the amendment. The plaintiffs argued that the federal Medicaid program must require participating states to fund "medically necessary" abortions. They also contended that the amendment infringed on their guarantees of due process and equal protection by refusing to reimburse the state for all medically necessary abortions while funding the expenses associated with childbirth.[46]

The Court let the Hyde Amendment stand. Writing for a five-to-four majority, Justice Stewart noted that the Medicaid program was rooted in the shared financial contribution of both the federal government and the participating state. However, he insisted that the federal government never meant to coerce a state into providing any health services that Congress itself refused to fund. What was true of health services in general was true of abortion in particular. Hence, the Court concluded that a participating state has no obligation "to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."[47]

The Court also rejected the claim that the Hyde Amendment unduly restricted the woman's liberty of choice guaranteed by *Roe*. Citing *Maher*, Justice Stewart argued that the *Roe* decision did not prevent a state from preferring childbirth to abortion and supporting that preference with public funds. However, the litigants argued that their case was different from *Maher*. Whereas *Maher* involved a refusal to fund nontherapeutic abortions, the Hyde Amendment denied reimbursement for many medically necessary abortions. By not paying for a therapeutic abortion, the amendment could endanger a woman's health and thus violate her constitutional rights. Justice Stewart acknowledged the difference between *McRae* and *Maher*. However, he brushed aside the idea that the amendment infringed upon the woman's freedom of choice recognized in *Roe*. In his view, there was a difference between immunity and entitlement. Recognition of an immunity from state interference with the right to abortion did not automatically create an entitlement to government funding for terminating a pregnancy.[48]

The equal protection argument in *McRae* failed for the same reason

---

[45] Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979).
[46] *McRae*, 448 U.S. at 304-05.
[47] *Id.* at 311.
[48] *Id.* at 316-18.

that it did in *Maher*. As noted above, the *Maher* Court reasoned that a regulation funding childbirth but not abortions did not discriminate against a suspect class. On this issue, Justice Stewart found *McRae* and *Maher* to be identical. Thus he concluded that the Hyde Amendment was "not predicated on a constitutionally suspect classification."[49] Rather, by providing incentives for childbirth, the amendment was reasonably related to a valid government interest in protecting potential life.[50]

IV. STANDARD OF CARE REGULATIONS

The dissenting justices interpreted the abortion funding cases as a retreat from the doctrine of *Roe*. By focusing its interest on potential life, they argued, the state neglected the mother's health and restricted her freedom of choice.[51] However, in both *Akron* and *Thornburgh*, the Court's pro-abortion majority went out of its way to reaffirm the principles of *Roe* and the validity of the trimester system. Both opinions invoked the doctrine of stare decisis. In *Akron*, Justice Powell recalled that the "doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[52] The hospitalization requirement in *Akron* and the determination of viability in *Thornburgh* best reflect the Court's conflict and its direction.

A. Hospitalization Requirement

The Akron ordinance mentioned above required that all abortions after the first trimester be performed in a hospital setting. The *Roe* court had listed a second trimester hospitalization requirement as an example of a permissible state regulation of maternal health. However, delivering a five-to-four majority opinion, Justice Powell found that the Akron legislation "places a significant obstacle in the path of women seeking an abortion."[53] Not only were hospital abortions twice as expensive as clinical abortions, but Akron hospitals also rarely terminated pregnancies in the second trimester. According to the majority, this combination of increased cost and restricted facilities "may significantly limit a woman's ability to obtain an abortion."[54]

Justice Powell began his examination of the Akron legislation by re-

---

[49] *Id.* at 322.

[50] *Id.* at 324-26.

[51] Justices Brennan, Marshall, and Blackmun dissented strongly and at length to all three decisions. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 482-90 (1977).

[52] Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 419-20 (1983).

[53] *Id.* at 434.

[54] *Id.* at 435.

affirming the *Roe* framework. The "trimester standard . . . continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions."[55] As noted above, the *Roe* doctrine considered that the state's interest in protecting maternal health became compelling at about the end of the first trimester. Thus, legislation requiring hospitalization after the first twelve weeks of pregnancy could withstand constitutional challenge provided it was reasonably related to maternal health and in line with "accepted medical practice." The majority admitted that the Akron provision would probably have been acceptable in 1973, when second trimester abortions were more dangerous to maternal health than childbirth. However, a decade later, the use of the dilation and evacuation ("D&E") procedure had reversed the situation. D&E was always fatal to the fetus, but it had increased the safety of second trimester abortions dramatically for the mother.[56]

When D&E was used, medical evidence indicated that abortions were as safe as childbirth for the early weeks of the second trimester. Of greater concern for the *Akron* case, however, was that professional groups such as the American College of Obstetricians and Gynecologists agreed that some second trimester abortions could be performed as safely in an outpatient abortion clinic as in a full service hospital.[57] The current medical evidence, then, would not justify a blanket hospitalization requirement for second trimester abortions. Thus, the Court concluded that the Akron ordinance requiring that all such abortions be performed in a hospital was not reasonably related to the state's interest in protecting maternal health. Instead, it "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive . . . and safe abortion procedure. . . . and therefore unreasonably infringe[d] upon a woman's constitutional right to obtain an abortion."[58] In *Simopoulos v. Virginia*,[59] a companion case to *Akron*, the Court let stand a second trimester hospitalization provision very similar to the one invalidated in *Akron*. The crucial difference was that the Virginia understanding of "hospital" included outpatient clinics.[60]

B. Viability Concerns

The *Roe* Court held that the state has a compelling interest in regulating post-viability abortions. The question then became: to what extent can the state legislate the time of viability and regulate both the abortion

---

[55] *Id.* at 429 n. 11.
[56] *Id.* at 435-37.
[57] *Id.* at 437.
[58] *Id.* at 438-39.
[59] 462 U.S. 506 (1983).
[60] *Id.* at 510-19.

procedure used by physicians and the standard of care given to viable fetuses? Prior to *Thornburgh*, the Court's most detailed treatment of these issues came in *Colautti v. Franklin*,[61] decided in 1979. The *Colautti* case involved a provision of the Pennsylvania Abortion Control Act mentioned earlier. Before performing an abortion, the Act required physicians to use their best professional judgment to determine whether the fetus was viable and to treat viable fetuses with the same medical care they would give to those destined for normal birth. Physicians also had to use the abortion procedure that offered the fetus the best chance of survival, provided that it did not endanger the life or health of the mother.[62]

Justice Blackmun delivered the opinion for the Court. He invalidated both the "viability-determination requirement"[63] and the "standard of care provision" because they were "impermissibly vague."[64] The fatal flaw in the Act's viability requirement was its failure to be specific as to how viability was to be established. As written, the statute amounted to little more than "a trap for those who act in good faith" and it could have a "chilling effect" on physicians performing abortions near the time of viability.[65] The majority had similar difficulties with the Act's standard of care. It was unclear to them whether the provision required a " 'trade-off' between the woman's health and . . . fetal survival."[66] In the Court's view, the physician's primary concern always had to be maternal health rather than fetal life.

The *Thornburgh* case involved a revised version of the Pennsylvania Abortion Control Act struck down in *Colautti*. One provision of the Act directed the physician to determine whether or not the fetus was viable;[67] another banned post-viability abortions except when they were necessary to protect the life or health of the mother.[68] Like its earlier version, the revised Act required physicians aborting viable fetuses to use a method that would give the fetus the best chance of survival unless the procedure would present a significantly greater risk to the life or health of the pregnant woman.[69] Finally, when fetal survival was possible, the Act required the presence of a second physician to provide medical care for the aborted fetus.[70]

---

[61] 439 U.S. 379 (1979).

[62] PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977) (§ 5(a) of the Pennsylvania Abortion Control Act).

[63] *Colauti*, 439 U.S. at 390-97.

[64] *Id.* at 391-96.

[65] *Id.* at 395-96.

[66] *Id.* at 400.

[67] PA. CONS. STAT. ANN. § 3211(a) (1983).

[68] *Id.* at § 3210(a).

[69] *Id.* at § 3210(b).

[70] *Id.* at § 3210(c).

The Court invalidated the post-viability provisions, along with the rest of the Abortion Control Act, on the general principle that the "States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[71] After specifically reaffirming the principles laid down in *Roe*, Justice Blackmun went on to declare that the words "significantly greater" implied an unconstitutional trade-off between maternal health and fetal life. The mother's health must always be the "paramount consideration," and she must not be forced "to bear an increased medical risk in order to save her viable fetus."[72]

The Court also struck down the second-physician requirement. The provision simply did not provide for emergency situations when a second-physician may not be available. In *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*,[73] the Court upheld a Missouri second-physician statute similar to Pennsylvania's. However, the *Ashcroft* Court found an "implied exception" to the law, when a second physician was unavailable in emergencies.[74] The *Thornburgh* Court did not find such an exception in the Pennsylvania legislation. In fact, the opposite was true. Justice Blackmun charged that the legislature's "failure to provide a medical-emergency exception . . . was *intentional*."[75] Thus, the Court concluded that the abortion regulation created an unacceptable danger to the mother's life and health and was "chilling" to physicians performing post-viability abortions. Since today's dissent can become tomorrow's majority opinion, a brief examination of the dissent to *Roe* and its offspring will be helpful.[76]

V. THE DISSENT

The dissenters in *Roe* and the subsequent pro-abortion decisions have focused on two of *Roe*'s primary features. First, the *Roe* opponents have argued that there is no right to privacy in the Constitution that is broad enough to embrace the woman's decision to terminate her pregnancy. Second, they have maintained that the choice of viability as the time when the state can assert its interest in fetal life is arbitrary and subject to developments in medical technology. The dissents of Justices White and O'Connor go to the heart of the attacks on *Roe* and its

---

[71] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).

[72] *Id.* at 769.

[73] 462 U.S. 476 (1983).

[74] *Id.* at 485 n. 8.

[75] *Thornburgh*, 476 U.S. 771. (emphasis added).

[76] Duncan, *Justice O'Connor, The Constitution, and the Trimester Approach to Abortion: A Liberty on a Collision Course With Itself*, 29 CATH. LAW. 275, 278 (1984).

progeny.

A. *Justice White*

Justice White dissented from the *Roe* decision because he could not find a legitimate basis in the Constitution for a fundamental right to terminate a pregnancy. Abortion did not meet the Constitutional criteria for a fundamental right, *i.e.*, it was neither implicit in the concept of ordered liberty, nor was it deeply rooted in the nation's history and tradition. Rather, the Court created the abortion right through an "exercise of raw judicial power."[77] From *Roe* through *Thornburgh*, White has insisted that abortion is a moral question that ought to be settled in the political arena. The issue should be resolved by the will of the people, expressed either through the legislative process or by the principles of their Constitution. Since the Constitution does not address the abortion problem, Justice White "would return the issue to the people by overruling *Roe v. Wade*,"[78]

He also charged that the *Roe* trimester framework was not feasible. "[T]he Court's choice of viability as the point at which the State's interest [in fetal life] becomes compelling is entirely arbitrary."[79] According to Justice White, the government's concern for fetal life did not depend on the capability of meaningful life outside the womb, nor was it "contingent on the state of medical practice and technology." Rather, this interest was inherent "in the fetus as an entity in itself" and was not activated at viability but was equally compelling throughout the entire pregnancy.[80]

B. *Justice O'Connor*

In her lengthy and widely publicized dissent in *Akron*, Justice O'Connor focused on three main points. First, she maintained that the trimester approach was a "completely unworkable method" for reviewing challenges to abortion legislation and should be abandoned.[81] Second, she argued that the potential for human life was extant through gestation.[82] Finally, she criticized the Court's constitutional standard for abortion cases.[83]

Justice O'Connor complained that the *Roe* trimester framework was

---

[77] Doe v. Bolton, 410 U.S. 179, 221-22 (1973) (White, J., dissenting) (expounding on *Roe*).
[78] *Thornburgh*, 476 U.S. at 797 (White, J., dissenting).
[79] *Id.* at 794.
[80] *Id.* at 794-95.
[81] Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting).
[82] *Id.* at 459-61 (O'Connor, J., dissenting).
[83] *Id.* at 455-59 (O'Connor, J., dissenting).

"inherently tied to the state of medical technology." Consequently, courts and legislatures had to stay abreast of the latest medical literature to be certain that an abortion provision was in line with "accepted medical practice" as to the safety of a given abortion and the time of viability.[84] Regarding the review of abortion legislation, then, the trimester approach not only reduced the Court to an "ex officio medical board"[85] but also violated its primary function of applying neutral legal principles " 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time.' "[86]

Tied as it was to medical technology, Justice O'Connor considered the trimester approach useless as a framework for balancing the state's interest in both maternal health and fetal life. Medical advances would probably make abortion safer for the mother than childbirth up to and beyond viability. At the same time, different technological improvements would push viability back to ever earlier stages of pregnancy. In fact, Justice O'Connor thought it was "reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future."[87] In her view, these conflicting medical advances created serious problems for the *Roe* framework. Because abortion might become as safe or safer than continuing the pregnancy to term, states could be prevented from enacting restrictive abortion legislation designed to protect maternal health. At the same time, *Roe* left the states free to regulate or even ban abortion completely after viability. Because the *Roe* framework could not resolve these conflicts, the trimester system was "clearly on a collision course with itself."[88] Thus, she would file the trimester approach away in the same drawer with the flat earth theory and not appeal to the stare decisis doctrine to justify its continued use.

She also rejected *Roe's* choice of viability as the time when the state's interest in protecting the potential life of the unborn became compelling. According to Justice O'Connor, *Roe's* understanding of "potential life" was flawed. Potential life was just as potential in the first weeks of pregnancy as it was at viability or afterward. "At any stage in pregnancy, there is the *potential* for human life."[89] Hence, the selection of viability as the magic moment for validating the state's compelling interest in potential life "is no less arbitrary than choosing any point before viability or

---

[84] *Id.* at 455-59 (O'Connor, J., dissenting).

[85] *Id.* at 456 (O'Connor, J., dissenting).

[86] *Id.* at 458 (O'Connor, J., dissenting) (citing A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)).

[87] *Id.* at 457 (O'Connor, J., dissenting).

[88] *Id.* at 458 (O'Connor, J., dissenting).

[89] *Id.* at 461 (O'Connor, J., dissenting).

any point afterward."[90] Accordingly, Justice O'Connor insisted that the state has a legitimate concern in safeguarding potential life throughout gestation.

The dismantling of the trimester system had important implications for the constitutional standard applied in abortion decisions. In her dissent in *Thornburgh*, Justice O'Connor accused the majority of being too rigid in its scrutiny. To her, it was "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."[91] She proposed that abortion regulations be judged by the "unduly burdensome" standard developed in *Maher*. If legislation does not impose a hardship on a woman's abortion decision, it should be upheld provided it meets the rational basis test. If the provisions involve "absolute obstacles or severe limitations on the abortion decision," the strict scrutiny standard of review must be applied.[92] In her dissent, Justice O'Connor made it clear that she did not think it was an undue burden on a woman seeking an abortion to require a twenty-four-hour waiting period, to require hospitalization for second-trimester abortions, or to require her to have detailed information from her physician about fetal development and abortion dangers.

In summary, *Roe* and its progeny attempted to balance the state's legitimate interests in both maternal health and fetal life. In its judicial review from *Roe* to *Thornburgh*, the Court never departed from its basic conclusion in *Roe* that a woman has a constitutional right to terminate her pregnancy. In fact, with the brief exception of the abortion funding cases, the liberal wing of the Court constantly expanded the mother's right to abortion and at the same time restricted the area where state regulation could be exercised. Yet the mentality of the Court had begun to change in *Thornburgh*. The solid seven-to-two *Roe* majority had dwindled to a bare five-to-four margin in *Thornburgh*. The dissent had become stronger and more focused. Moreover, on the eve of *Webster v. Reproductive Health Services*, the makeup of the Court had changed even more dramatically. Only four of the original *Roe* supporters remained on the Court, while the other five justices had either publicly dissented from *Roe* or were thought to be opposed to its reasoning. Thus, the *Webster* case provided the Court with a real opportunity either to overrule *Roe* or to modify it significantly.

---

[90] *Id.* (O'Connor, J., dissenting).

[91] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) (emphasis added).

[92] *Akron*, 462 U.S. at 463-64 (O'Connor, J., dissenting).

VI. WEBSTER v. REPRODUCTIVE HEALTH SERVICES[93]

The *Webster* case grew out of a 1986 Missouri law revised to update existing statutes concerning abortion and the unborn. The preamble and three other provisions of the statute reached the Court on appeal. The preamble contained a "finding" by the legislature that the "life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health and well-being" at any stage of pregnancy.[94] Provisions barred public employees from performing or assisting at abortions[95] and banned the use of public facilities for abortions, even when public funds were not involved.[96] The provision made exceptions when the mother's life was threatened. The Act also made it unlawful to use public funds for encouraging or counselling a mother to terminate her pregnancy if her life was not endangered.[97] A final provision required physicians to conduct certain tests to determine whether the fetus was viable if they had reason to believe that the woman seeking the abortion was at least twenty weeks pregnant.[98] Asserting violations of various rights, an abortion clinic and a group of doctors brought a class action suit against the statute.[99]

Chief Justice Rehnquist, writing for a deeply divided Court, upheld most of the Missouri provisions but stopped short of overruling *Roe v. Wade*. The majority easily disposed of the Missouri preamble and the ban against abortion counselling. Although the preamble was an important symbol for both sides, Rehnquist ruled that it was not primarily an abortion regulation but was essentially a "value judgment favoring childbirth over abortion" that Missouri had a right to make. Since there was no evidence that the provision had been or would ever be applied to restrict access to abortion, the Court did not have to decide its constitutionality.[100] Chief Justice Rehnquist also dismissed the abortion-counselling ban as moot. The provision was withdrawn from appeal when the state conceded that it applied only to those persons responsible for allocating public funds and not to the "conduct of any physician or health care provider, public or private."[101] With these preliminaries taken care of, the Chief Justice turned his attention to the two most controversial features of the *Webster* case: the ban on abortions in public facilities and viability

---

[93] 109 S. Ct. 3040 (1989).
[94] MO. ANN. STAT. § 1.205 (Vernon 1983 & Supp. 1990).
[95] *Id.* § 188.210.
[96] *Id.* § 188.215.
[97] *Id.* § 188.205.
[98] *Id.*
[99] *Webster*, 109 S.Ct. at 3047.
[100] *Id.* at 3050.
[101] *Id.* at 3053.

testing.

A. *Public Employees and Facilities*

Rehnquist upheld the prohibition on the use of public employees and public facilities for nontherapeutic abortions even when the patients could pay for them. In his view, the Missouri policy raised issues similar to those the Court decided in the abortion funding cases and in *Poelker v. Doe*,[102] a companion case to *Beal* and *Maher*. In *Poelker*, the majority let stand a St. Louis ordinance denying abortions at publicly operated city hospitals on the ground that the city had a legitimate interest in encouraging childbirth.[103] Applying the Medicaid analysis in *Webster*, the Chief Justice argued that "the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' "[104]

The Missouri regulations did not restrict the pregnant woman's abortion options any more than if the state had chosen not to operate any public hospitals at all. "The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital."[105] The Missouri policy was merely a logical extension of the *Maher* doctrine. If the state can favor childbirth over abortion by denying public funds, surely it may do the same "through the allocation of other public resources, such as hospitals and medical staff."[106]

The Court also rejected the argument that *Webster* differed from *Maher* because Missouri was expressing more than its preference for childbirth over abortion. The regulation could actually make it very difficult for a woman to exercise her right to an abortion. Chief Justice Rehnquist brushed this charge aside, claiming that "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions. Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions."[107]

B. *Viability Testing*

The matter of viability testing was easily the most important and the most controversial feature of the *Webster* decision. In addressing this

---

[102] 432 U.S. 519 (1977).
[103] *Id.* at 521.
[104] *Webster*, 109 S. Ct. at 3052 (quoting Harris v. McRae, 448 U.S. 297, 315 (1980)).
[105] *Id.*
[106] *Id.*
[107] *Id.*

provision, the plurality seized the opportunity to attack the *Roe* framework. According to Chief Justice Rehnquist, the problem the Court faced was not so much with the Missouri regulation as with the *Roe* analysis itself. "We think that the doubt cast upon the Missouri statute . . . is not so much a flaw in the statute as it is a reflection of the . . . rigid trimester analysis . . . ."[108] The Chief Justice went on to characterize the trimester system as "unsound in principle and unworkable in practice."[109] When applied to subsequent abortion cases, it has made "constitutional law in this area a virtual Procrustean bed."[110]

The majority had problems with both the *Roe* trimester system and its time of viability. *Roe's* rigid framework was simply inconsistent with the general terms and broad principles contained in the Constitution. The main features of the *Roe* decision could not be found either in the text of the Constitution or in any other place one would expect to find a constitutional principle. Consequently, *Roe* resembled "a code of regulations rather than a body of constitutional doctrine."[111] Furthermore, the time of viability was confusing. Rehnquist could "not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[112]

In the absence of the trimester framework, the *Webster* plurality could uphold the constitutionality of viability testing because the state "ha[d] chosen viability as the point at which its interest in potential human life must be safeguarded."[113] Chief Justice Rehnquist admitted that the required tests would drive up the cost of abortions and regulate the physician's direction in establishing viability. However, despite these negative side affects, the Court was "satisfied that the requirement of these tests permissibly further[ed] the State's interests in protecting potential human life."[114]

Despite dismantling the trimester structure, the Court declined to overturn the *Roe* decision. That was unnecessary as Missouri did not attempt to restrict abortions before viability. Thus, the plurality was content to leave *Roe* "undisturbed," adding that they "would modify and narrow" it in appropriate later cases.[115] While concurring with Rehnquist

---

[108] *Id.* at 3056.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 3057.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 3058.

for the most part, Justices Scalia and O'Connor had separate and distinct opinions on the matter of reversing *Roe*. Scalia thought that there were "'not only valid but compelling" reasons for attacking *Roe* directly.[116] Justice O'Connor, on the other hand, thought that "[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to re-examine *Roe*. And to do so carefully."[117]

VII. CRITICAL REFLECTIONS

I mentioned earlier that the *Webster* decision met with mixed and stormy public reviews. However, the Supreme Court itself also lost its customary decorum and joined the fray. The rage and rhetoric that had characterized the public debate on abortion prior to *Webster* crept into the language of the decision. In a particularly bitter dissent, Justice Blackmun blasted the majority for their brute force, cowardice, deception, disingenuousness, nonsense and illegitimacy.[118] The conservative majority also bickered among themselves. Although they came down on the same side of the case, Justice Scalia characterized Justice O'Connor's position as "irrational"[119] and declared that her reasons for not reconsidering *Roe* "cannot be taken seriously."[120]

Despite the rhetoric and slogans that accompanied it, *Webster's* immediate impact was narrow. The decision did not affect private physicians and facilities, where most abortions are actually performed. Moreover, since the testing provision applied only after viability, it did not restrict the pregnant woman's access to an early abortion. Also, the ruling did not have an immediate impact beyond Missouri since no other state had abortion regulations identical to the ones upheld in *Webster*. However, the real importance of the decision lies, not in its specifics, but in the implications it has for legislative activity and future abortion cases.

A. Legislative Activity

In his dissent, Justice Blackmun argued that the majority opinion issued an implicit invitation to every state to enact more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception.[121] There is no doubt that the *Webster* decision "implicitly invited" the states to present new challenges to *Roe*. Thus, the abortion

---

[116] *Id.* at 3065 (Scalia, J., concurring in part).
[117] *Id.* at 3061 (O'Connor, J., concurring in part).
[118] *Id.* at 3067-79 (Blackmun, J., dissenting).
[119] *Id.* at 3066 n.* (Scalia, J., concurring in part).
[120] *Id.* at 3064 (Scalia, J., concurring in part).
[121] *Id.* at 3067 (Blackmun, J., dissenting).

battleground has shifted back to the state legislatures, where it had been sixteen years ago when the Court preempted the abortion question with its *Roe* decision. However, the present social climate on abortion is much more volatile than it was when *Roe* was handed down. Now abortion has become a central and controversial feature of the political landscape. As partisans on both sides of the issue attempt either to enact more rigid abortion regulations or to prevent the reversal of advantages won through the courts, the legislative struggle will undoubtedly be protracted, bitter and divisive.

The *Webster* decision did not spell out the scope and limits of what the states could do in regulating abortion. However, given their first realistic chance in sixteen years to restrict the termination of pregnancies, pro-life groups will press for more stringent laws than those upheld in *Webster*. These will include many of the provisions the Court invalidated since *Roe*, such as mandatory waiting periods, informed consent, parental consent and notification for minors, and required hospitalization. Other legislative possibilities include viability testing, banning of federal funds and facilities and a more restricted definition of health than the Court set forth in *Doe v. Bolton*.[122]

For their part, pro-choice strategists will mobilize to prevent the enactment of any state legislation infringing on the woman's freedom of choice. Moreover, fearing a reversal of *Roe*, abortion advocates are likely to concentrate on having a right to privacy enshrined in state constitutions. A few states have taken that step already. Moreover, some activist state courts have appealed to a state right to privacy to require the state to fund nontherapeutic abortions.[123] For example, the New Jersey Supreme Court, in 1982, decreed that state law allowed women access to abortion regardless of their ability to pay.[124]

B. Future Abortion Cases

On the same day it handed down *Webster*, the Court decided to resolve some of the remaining issues by agreeing to hear three new abortion cases in its fall term.[125] They all involve state regulations that can create obstacles for pregnant women seeking abortions. Two of these cases concern state laws mandating parental notification for all minors wanting to terminate their pregnancies. The third requires clinics performing first trimester abortions to meet medical standards similar to those demanded

---

[122] 410 U.S. 179, 192 (1973).

[123] Fein, *The Court is Ready to Overturn "Roe,"* N.Y.Times, July 5, 1989, at A16.

[124] Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 935 (1982).

[125] The three cases are: Turnock v. Ragsdale from Missouri; Ohio v. Akron Center for Reproductive Health; and Hodgson v. Minnesota. *See* N.Y. Times, July 4, 1989, at A10.

of full-care hospitals. The outcome of these cases will depend on what standard of review the Court chooses to apply.

When it was expanding the woman's right to terminate her pregnancy, the liberal wing of the Court applied the strict scrutiny standard to strike down virtually every piece of abortion legislation it reviewed. In the *Webster* decision, Justice Rehnquist introduced a new test: an abortion regulation would be upheld if it "permissibly furthers the State's interest in protecting potential human life."[126] In his dissent, Justice Blackmun found this "newly minted standard" to be "circular and totally meaningless." This "novel test" appeared to him "to be nothing more than a dressed-up version of the rational-basis review, this Court's most lenient level of scrutiny."[127] Justice O'Connor added to the confusion. She opted for a middle ground, a standard more difficult than Chief Justice Rehnquist's but less stringent than Justice Blackmun's. According to her, abortion legislation would be valid as long as it did not "unduly burden" a woman's abortion decision.[128] The justices' different standards of review reflect their differences over whether abortion is truly a fundamental right. On that issue, the Court is in disarray.[129]

As mentioned above, Justice White thought that abortion did not meet the criteria for a fundamental right, *i.e.*, it was neither "implicit in the concept of ordered liberty," nor was it "deeply rooted in the nation's history and tradition."[130] However, Justice Blackmun, in his dissent, insisted that, at the very minimum, "a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy."[131] In contrast, Chief Justice Rehnquist believed abortion was not "a liberty interest protected by the due process clause."[132] Although she has remained silent on the matter, Justice O'Connor's willingness to apply the strict scrutiny level of review to legislation that "unduly burdens" a woman's abortion decision presupposes some kind of limited fundamental right to terminate a pregnancy.[133]

---

[126] *Webster*, 109 S. Ct. at 3057.

[127] *Id.* at 3076 (Blackmun, J., dissenting).

[128] Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

[129] Commentary, *A Thorn in the Side of Privacy: The Need for Reassessment of the Constitutional Right to Abortion'*, 70 MARQ. L. REV. 534, 557 (1987). In these pages Kunz has a thorough analysis of the disagreement within the Court over fundamental rights prior to *Webster*. *Cf.* Shapiro, *The Abortion Decision: A Threat to Liberties*, Washington Post, July 9, 1989, at B4.

[130] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 793 (1986) (White, J., dissenting).

[131] *Webster*, 109 S.Ct. at 3076 (Blackmun, J., dissenting).

[132] *Id.* at 3058.

[133] *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

In the *Webster* case, Chief Justice Rehnquist finessed the fundamental rights issue. He did not state explicitly that abortion was not a fundamental right. However, he argued that the Court's experience in applying *Roe* to subsequent abortion cases convinced him "that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion, . . . a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause."[134] This is not the language of fundamental rights, that select category of rights that can be regulated only if the state can prove a compelling interest.

VIII. CONCLUSION

In its frequent review of legislation in the wake of its *Roe* decision, the Court's abortion doctrine has reflected, more than anything else, its liberal or conservative composition. When its liberal wing was the majority, the Court broadened the right to terminate a pregnancy by curtailing state regulation of the practice. The emergence of a conservative block has moved the Court sharply to the right on the abortion question. Without actually overruling *Roe*, the *Webster* majority reversed the liberal trend by allowing states to exercise some control over the woman's right to terminate her pregnancy. However, as long as the Court's conservative justices are unable to agree on the nature of the abortion right and the appropriate standard for reviewing it, the extent of state regulation of abortion and the future of abortion rights will remain problematic.

As in the past, the future direction of abortion will be determined by the philosophical perspectives of the justices who apply the Constitution to abortion legislation. Of the current Court, four liberal justices continue to reaffirm the *Roe* conclusions, while four conservatives seem inclined to overrule the decision. Justice O'Conner remains ambiguous. In both *Akron* and *Thornburgh*, she declined to address *Roe* directly because the Court had not been asked to reexamine that decision. When asked in *Webster*, she refused, stating that there would be time enough to do that later. She continues to view the *Roe* trimester framework as "problematic." However, her criticism of *Roe* in *Webster* was more muted than it was in either *Akron* or *Thornburgh*. Perhaps, she does not relish the role of being the swing vote for either upholding legalized abortion or for striking it down. Consequently, given its current makeup, it is unlikely that the Court will overrule the *Roe* decision during its fall session. Instead, it will probably be content to "modify and narrow" *Roe* by chipping away at its edges.

---

[134] *Webster*, 109 S. Ct. at 3068.